

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 16, 1997

GREGORY OLSON,	)	
Complainant	)	
	)	8 U.S.C. 1324b Proceeding
vs.	)	
	)	OCAHO Case No. 97B00093
UNIVERSITY MEDICAL CENTER	)	
CORP.,	)	
Respondent	)	

ORDER GRANTING RESPONDENT'S  
REQUEST FOR ATTORNEYS' FEES

On October 8, 1996, Gregory Olson (Olson/complainant) filed a charge with this Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), alleging that on August 25, 1995, University Medical Center Corp. (UMC/respondent) had, by having refused to discontinue withholding federal taxes from his wages, committed unfair immigration-related employment practices namely, national origin and citizenship status discrimination, as well as document abuse, in violation of the pertinent provisions of the Immigration Reform and Control Act (IRCA), as amended, 8 U.S.C. § 1324b(a)(1) and § 1324b(a)(6).

On January 30, 1997, following its investigation of Olson's charges, OSC advised him in a determination letter that "there is insufficient evidence of reasonable cause to believe that any of these charges state a cause of action under 8 U.S.C. § 1324b," and that it also "appears that [the] charges . . . were not timely filed with this Office".

For those reasons, OSC informed Olson that it was declining to file an action on his behalf before an Administrative Law Judge assigned to this Office and that he was entitled to file a private action directly with this Office if he did so within 90 days of his receipt of that correspondence.

On April 14, 1997, Mr. John B. Kotmair, Jr. timely commenced this private action on Olson's behalf by having filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging citizenship status discrimination and document abuse in violation of the pertinent IRCA provisions.

On May 16, 1997, UMC filed an answer along with a pleading captioned Motion to Dismiss for Failing to State a Claim, or In the Alternative, Motion for Summary Decision, together with a supporting memorandum.

On September 3, 1997, the undersigned issued an Order granting respondent's dispositive motion in its entirety and dismissing complainant's April 14, 1997 Complaint. It was found that complainant's allegations related exclusively to an ideological dispute over the withholding of federal taxes from his wages, as provided for under the provisions the U.S. Internal Revenue Code, as opposed to any charges addressable under IRCA's coverages.

That Order also addressed respondent's request for attorney's fees pursuant to 8 U.S.C. § 1324b(h), which provides: "In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact."

In that Order, also, was a finding that respondent was the prevailing party and that Kotmair's arguments on behalf of Olson were without reasonable foundation in law and fact within the meaning of 8 U.S.C. § 1324b(h), entitling UMC to petition that it be awarded those reasonable attorneys' fees which it has incurred in defending against Olson's meritless charges. Towards that end, UMC's attorneys were requested to file an itemized statement of fees detailing the time expended and the rate at which the fees and any related expenses were computed. 28 C.F.R. § 68.52(c)(2)(v)<sup>1</sup>.

On September 10, 1997, respondent timely filed a document entitled Respondent's Itemized Statement of Fees, along with an Attorneys' Fees Declaration executed by D. Douglas Metcalf, Esquire, an associate attorney of Brown & Bain, P.A., and documentary data supporting its claim for attorneys' fees (\$6,960.00) and costs (\$557.46) in the total sum of \$7,517.46.

Complainant has not filed a response to UMC's request for attorneys' fees.

Therefore, the sole remaining issue presented for adjudication is that of determining the reasonableness of UMC's attorneys' fees totalling \$7,517.46.

The Supreme Court has repeatedly and quite pragmatically advised that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Blanchard v. Bergeron, 489 U.S. 87, 94 (1989); Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 564 (1986); Blum v. Stenson, 465 U.S. 886, 888 (1984); Hensley v. Eckerhart 461 U.S. 424, 433 (1983).

---

<sup>1</sup> Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Part 68 (1997).

This so-called “lodestar” approach in assessing a request for attorneys’ fees has been followed by the U.S. Court of Appeals for the Ninth Circuit. See, e.g., Miller v. Los Angeles Cty. Bd. of Ed., 827 F.2d 617, 621 (9th Cir. 1987) (“strong presumption exists that the lodestar represents a reasonable fee”); and has been applied in prior OCAHO cases involving tax protesters. Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 966 (1997); Horne v. Town of Hampstead, 7 OCAHO 959 (1997); Lee v. Airtouch Communications, 7 OCAHO 926 (1997).

In arriving at their requested attorneys’ fees, respondent’s counsel of record have submitted three (3) invoices for services dated May 29, 1997, June 20, 1997, and July 16, 1997, which provide a detailed narrative for the services rendered and the time expended for each service:

Sally R. Simmons, Esquire	\$ 1,710.00
Partner	
9.5 hours @ \$180	
D. Douglas Metcalf, Esquire	5,373.00
Associate	
39.8 hours @ \$135	
Total Legal Fees	\$ 7,083.00 <sup>2</sup>
Total Expenses - copying, postage, telephone, computer-aided research	\$ 557.46
Total Attorneys’ Fees	\$ 7,640.46

It has thus been demonstrated that UMC’s attorneys spent a total of 49.3 hours defending this action on its behalf, and that D. Douglas Metcalf, Esquire, devoted some 39.8 hours, or approximately 81% of the total billable hours, to that task.

Of those 49.3 hours, some 47.9 hours, or approximately 97% thereof, involved the efforts of counsel which took place within the first month following UMC’s receipt of the Complaint. During that time period, UMC’s counsel quite appropriately prepared and filed an answer, as well as a dispositive motion.

Those filings necessarily involved research efforts pertaining to the legal issues raised in

---

<sup>2</sup> The actual legal fees billed to UMC, as reflected in the three (3) invoices dated May 29, 1997, June 20, 1997, and July 16, 1997, totalled \$6,960.00, or some \$123 less than the \$7,083 total legal fees sum set forth in respondent’s attorneys’ fee narrative provided to the undersigned. The lower of those two sums, namely \$6,960, will be the operative attorneys’ fees sum considered herein.

the Complaint. That research included not only section 1324b of IRCA, but because of complainant's obscure and totally unrelated tax-related claims, federal tax law as well. In addition, respondent's counsel submitted a memorandum of law with their responsive pleading. The detailed statement of fees further discloses that time was spent in obtaining and drafting affidavits.

It is found that UMC's counsel expended those legal efforts most professionally and did so expeditiously. Respondent's attorneys are to be commended for distilling complainant's obscure tax-related claims, which had been misapplied in this immigration-related cause of action, in the relatively short billable time period of 49.3 hours.

In view of the foregoing, it is found that UMC's counsel performed their services in a most reasonable period of time.

We now review the reasonableness of UMC's attorneys' hourly rates. It should be noted that some 81% of those 49.3 billable hours was incurred at the rate of \$135 per hour, that being the rate charged for the services of D. Douglas Metcalf, Esquire, an associate of the Brown and Bain law firm. Mr. Metcalf has advised that his normal rate is \$150 per hour and that he billed his time herein at \$135 per hour, instead, or some 10% below the usual hourly rate.

Similarly, the remaining billable hours involved services performed by that firm's partner, Sally R. Simmons, Esquire, at a reduced rate of \$180 per hour, representing a 10% reduction from her normal \$200 hourly charge. Overall, the average hourly rate charged was \$141.18 ( $\$6,960 \div 49.3$  hours).

Mr. Metcalf has further declared that the hourly rates charged are fair and reasonable and are commensurate with the prevailing rates charged in the Tucson, Arizona metropolitan area for the services of attorneys with similar experience and competence in matters of this nature.

Complainant has not replied to, commented upon, or challenged any portion of respondent's attorneys' bill for attorneys' fees.

Upon review of respondent's attorneys' hourly rates, as set forth in their bill for services, it is also being found that those hourly rates which respondent's attorneys charged in this matter were extremely reasonable.

Finally, UMC's counsel has advised that in addition to hourly attorneys' fees totalling \$6,960, their firm incurred expenses totalling \$557.46, consisting of charges for copying and printing, long distance telephone calls, telefaxing, postage, and computer-aided research, with the latter item accounting for almost 55% of those expenses.

While those charges are somewhat higher than those noted in the many other seemingly

unending and extremely similar tax protester cases which Mr. Kotmair has filed in this Office, they are not so dissimilar monetarily as to preclude the entry of a finding that they are reasonably based, also.

Therefore, because the attorneys' fees incurred by UMC in defending this matter have been found to be reasonable, based both upon the number of hours expended and the reasonableness of the hourly rates charged by its attorneys, it is further found that UMC is entitled to the sum of \$7,517.46 as its reasonable attorneys' fees.

Accordingly, under the authority contained in the provisions of 8 U.S.C. § 1324b(h), it is hereby ordered that complainant pay to UMC the sum of \$7,517.46 as and for UMC's reasonable attorneys' fees incurred in this proceeding.

Joseph E. McGuire  
Administrative Law Judge

#### Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the Circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 1997, I have served copies of the foregoing Order Granting Respondent's Request for Attorneys' Fees to the following persons at the addresses shown, in the manner indicated:

Office of Chief Administrative Hearing Officer  
Skyline Tower Building  
5107 Leesburg Pike, Suite 2519  
Falls Church, Virginia 22041  
(original hand delivered)

John D. Trasvina, Esquire  
Office of Special Counsel for Immigration  
Related Unfair Employment Practices  
P.O. Box 27728  
Washington, D.C. 20038-7728  
(one copy sent via regular mail)

Mr. Gregory Olson  
1020 East Waverly  
Tucson, Arizona 85719  
(one copy sent via regular mail)

Mr. John Kotmair, Jr.  
National Worker's Right Commission  
12 Carroll Street, Suite 105  
Westminster, Maryland 21157  
(one copy sent via regular mail)

Sarah Simmons, Esquire  
D. Douglas Metcalf, Esquire  
Brown & Bain, P.A.  
One South Church Avenue, 19th Floor  
P.O. Box 2265  
Tucson, Arizona 85702-2265  
(one copy sent via regular mail)

Laurence C. Fauth  
Attorney Advisor to  
Joseph E. McGuire  
Administrative Law Judge  
Department of Justice  
Office of the Chief Administrative  
Hearing Officer  
5107 Leesburg Pike, Suite 1905  
Falls Church, Virginia 22041  
(703) 305-1043